No. 82-1406

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE W. LUKOVSKY, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1406

GEORGE W. LUKOVSKY, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of the decision below upholding the Tax Court's dismissal of their petition for failure to prosecute.

The relevant facts may be summarized as follows: On January 9, 1981, the Commissioner of Internal Revenue sent petitioners a statutory notice of deficiency, determining that they owed an additional $4,814.50 in federal income taxes for 1977. The deficiency resulted from the Commissioner's disallowance of certain business deductions petitioners had claimed on their return but were unable or unwilling to substantiate. On April 23, 1981, petitioners filed a petition in the Tax Court contesting the deficiency determined by the Commissioner (Pet. App. 19).

At a hearing before the Tax Court on March 22, 1982, the Commissioner filed a motion to dismiss petitioners' case for failure to properly to prosecute. The Commissioner cited

petitioners' failure to attend scheduled pre-trial conferences, their failure to attend a conference to stipulate to facts not reasonably in dispute, and their failure to produce any evidence substantiating the deductions they claimed. At the hearing, petitioners failed to introduce any evidence to support their deductions and instead argued that the Fifth Amendment privilege against compulsory self-incrimination justified their action (Pet. App. 20).

The Tax Court granted the Commissioner's motion to dismiss, reasoning that since there was no pending or threatened criminal prosecution against petitioners, the Fifth Amendment did not support their failure to produce evidence in support of their deductions (Pet. App. 20). The court of appeals affirmed (Pet App. 18-22). It held that the privilege against self-incrimination does not apply where, as here, the possibility of criminal prosecution is remote or unlikely. Since petitioners failed to prove that their deductions were proper, the court concluded that the Tax Court correctly dismissed their petition for failure to prosecute (Pet. App. 20-22).

1. It has long been settled that a deficiency in federal taxes determined by the Commissioner is presumptively correct and that the taxpayer has the burden of proof in the Tax Court. *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933); Tax Ct. R. 142(a) (May 1, 1979). To meet that burden, it was therefore incumbent on petitioners to introduce evidence to substantiate their claimed business deductions. Petitioners acknowledge that they failed to come forward with any such evidence. Thus, the Tax Court had no choice but to dismiss their suit for lack of prosecution.[1]

---

[1]The Tax Court's dismissal order is further supported by petitioners' failure to stipulate to facts not reasonably in dispute. Tax Ct. R. 91(a) (May 1, 1979) requires the parties to stipulate to facts to the extent

Petitioners contend (Pet. 8-17) that the Fifth Amendment privilege against compelled self-incrimination insulates them from the dismissal of their lawsuit. However, a bald claim of Fifth Amendment privilege, such as petitioners have made here, cannot be used by a party to meet the burden of proof in a civil proceeding that he has instituted. The Fifth Amendment may be used only as a "shield," not as a "sword." See *United States* v. *Carlson*, 617 F.2d 518 (9th Cir.), cert. denied, 449 U.S. 1010 (1980); *Lyons* v. *Johnson*, 415 F.2d 540 (9th Cir. 1969); *Edwards* v. *Commissioner*, 680 F.2d 1268 (9th Cir. 1982); *McCoy* v. *Commissioner*, 696 F.2d 1234 (9th Cir. 1983); *Urban* v. *United States*, 445 F.2d 641, 643 (5th Cir. 1971), cert. denied, 404 U.S. 1015 (1972). As the court stated in *Edwards, supra*, 680 F.2d at 1270:

> [Appellants'] fifth amendment claim merely rests on a generalized fear that if forced to turn over their business records, they somehow would be more likely to have criminal charges brought against them for tax evasion. Because there is no indication that production of their records would reveal criminal activity in their auto repair business and because the fifth amendment privilege may not itself be used as a method of evading payment of lawful taxes, * * * we reject appellants' fifth amendment claim as frivolous.

---

agreement on them can or fairly should be reached. Petitioners, however, failed to appear at a stipulation conference scheduled with the Commissioner's counsel. Since the stipulation process has been described as the "mainstay" or "bedrock" of practice before the Tax Court (note to Rule 91(a), as set out in *Branerton Corp.* v. *Commissioner*, 61 T.C. 691, 692 (1974)), petitioners' failure to make any effort to stipulate to facts not reasonably in dispute was itself sufficient justification for the dismissal of their Tax Court petition. *Miller* v. *Commissioner*, 654 F.2d 519, 521 (8th Cir. 1981); see also *Amato* v. *Commissioner*, 47 T.C.M. (P-H) 1199 (1977).

Thus, the Fifth Amendment privilege is ineffective as a substitute for proof in a civil tax proceeding, such as the present one, where the possibility of future criminal prosecution is speculative or remote. *Edwards* v. *Commissioner, supra; United States* v. *Neff*, 615 F.2d 1235 (9th Cir.), cert. denied, 447 U.S. 925 (1980); *Ryan* v. *Commissioner*, 67 T.C. 212, 217 (1976). As the court of appeals correctly concluded here (Pet. App. 21), "the privilege is available to protect * * * [petitioners] from real dangers of self-incrimination, not to avoid answering questions altogether."

Moreover, petitioners had no genuine basis to fear that producing evidence to support their business deductions could lead to criminal prosecution. They were advised by the Commissioner that, so far as could be determined, they were not the subject of any criminal investigation (C.R. 8 at 7; C.R. 10).[2] It is implausible that evidence supporting petitioners' deductions, even assuming it exists, could simultaneously tend to incriminate them. While the claimant need not incriminate himself in order to invoke the privilege, if the circumstances appear innocuous, he must make some positive disclosure indicating where the danger lies. *McCoy* v. *Commissioner, supra*, 696 F.2d at 1236. Petitioners have not done so here.[3]

---

[2]"C.R." references are to the numbered documents contained in the original record on appeal, as numbered by the Clerk of the Tax Court and transmitted to the court of appeals.

[3]The cases petitioners cite are not in point. *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); and *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), for example, all involve grand jury or other inquisitorial investigations of suspected criminal activities. The Fifth Amendment privilege was upheld in those cases because of the substantial risk of self-incrimination evident in such proceedings. Here, however, there is no

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1983

---

suspected criminal activity on petitioners' part, but merely the requirement that, like all taxpayers, they substantiate the deductions claimed on their income tax return.

DOJ-1983-03